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April 1, 1996

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

William F. Caton  
Acting Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: FCC 96-99, CS Docket No. 96-46

Dear Mr. Caton:

Enclosed is an original and eleven (11) copies of the "Comments of The Office of the Commissioner of Baseball" in the above-identified docket. Two of the copies have been annotated "Extra Public Copy" per the Commission's March 22, 1996 memorandum. If there are any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

*Robert Alan Garrett* /by smf  
Robert Alan Garrett

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of  
  
Implementation of Section 302  
of the Telecommunications Act  
of 1996  
  
Open Video Systems

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CS Docket No. 96-46

**COMMENTS OF THE OFFICE OF  
THE COMMISSIONER OF BASEBALL**

The Office of the Commissioner of Baseball ("Baseball"), by its attorneys, submits the following comments in response to the Commission's "Report and Order and Notice of Proposed Rulemaking," FCC 96-99, released March 11, 1996 ("Notice").

**BACKGROUND**

1. In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) ("1996 Act"), Congress authorized telephone companies and others to provide cable service through "open video systems." 1996 Act § 653(a)(1), 47 U.S.C. § 573(a)(1). The operator of an open video system is generally required to make its facilities available to different "video programming providers" and to comply with rules that the Commission must establish. Among other things, Congress

directed the Commission to extend the sports exclusivity rule (47 C.F.R. § 76.67) ("Sports Rule") to open video systems. 1996 Act § 653(b)(1)(D), 47 U.S.C. § 573(b)(1)(D).

2. Under the Sports Rule, a sports club may require cable systems within 35 miles to delete the distant signal telecast of any home game that is not televised by a local over-the-air broadcast station. The Commission adopted the Sports Rule in 1975 to help effectuate the policies underlying the Sports Broadcast Act of 1961, 15 U.S.C. §§ 1291 et seq. See Report and Order in Docket No. 19417, 54 F.C.C. 2d 265 (1975). Baseball has consistently requested Sports Rule protection from affected cable systems throughout the United States during each of the past twenty years.

3. In its Notice, the Commission seeks comment on a variety of issues related to open video systems. The issues include: (1) how to apply the Sports Rule and other exclusivity rules to an open video system whose service territory crosses multiple communities; (2) which entity should have responsibility for complying with requests for sports rule protection -- the operator of the open video system, the individual video programming provider or another party; and (3) which entity should have that responsibility when a

channel is shared between two or more video programming providers. Notice ¶ 46.

4. The Notice also seeks comment on the "overall applicability" of the retransmission consent requirements "in the context of open video systems." Notice ¶ 59. Those requirements are set forth in Section 325(b) of the Communications Act, 47 U.S.C. § 325(b) and 47 C.F.R. §§ 76.51 et seq. They generally prevent cable systems from retransmitting the signals of local and distant broadcast stations without obtaining the consent of those stations.

#### **DISCUSSION**

5. No entity may retransmit, over an open video system, the copyrighted programming broadcast by a television station unless it either (a) negotiates with the relevant program owner or (b) qualifies for the cable compulsory license set forth in Section 111(c) of the Copyright Act, 17 U.S.C. § 111(c). The 1996 Act leaves unresolved the issue of whether an entity that retransmits broadcast programming over an open video system qualifies for the cable compulsory license. Legislative language had been proposed by Rep. Boucher

to address this issue; but that language was never enacted.<sup>1</sup>

6. The Commission should make clear that it too is not attempting to resolve the Section 111 qualification issue, which requires an interpretation of a controversial provision of the Copyright Act. Likewise, the Commission should make clear that it is not expressing an opinion on any other issues of how, if at all, the compulsory licensing provisions in the Copyright Act should be applied to open video systems.

7. Concerning the questions raised by the Notice, first, Baseball takes no position on which entity must ensure compliance with requests for Sports Rule protection. It should be noted, however, that the Sports Rule is not self-executing. In order to receive the protection afforded by that rule, a sports club must provide timely notice. Therefore, it will not be sufficient for the Commission to state in its rules simply that compliance is the responsibility of the operator of the open video system, a video programming

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<sup>1</sup> To qualify for the cable compulsory license, an entity must be a "cable system" within the meaning of 17 U.S.C. § 111(f). Congress amended this provision in 1994 to clarify that MDS and MMDS operators qualified for the cable compulsory license. The 1996 Act states only that: "Nothing in this Act precludes a video programming provider making use of an open video system from being treated as an operator of a cable system for purposes of section 111 of title 17, United States Code." 1996 Act § 653(c)(4), 47 U.S.C. § 573(c)(4).

provider or someone else. The rules also must ensure that sports clubs will be able to identify the specific persons to whom particular Sports Rule notices must be directed.

8. Baseball, historically, has relied upon the Commission's public files to identify the affected cable systems. The relevant files are those created pursuant to 47 C.F.R. § 76.12 (which requires cable systems to register with the Commission and to identify the broadcast signals that they intend to carry) and 47 C.F.R. § 76.400 (which requires cable systems to notify the Commission of any change in the mailing address "to which all communications are to be directed"). By monitoring these files, Baseball has been able to identify each cable system within the relevant 35-mile zones and the mailing address of each such system.

9. Baseball believes that the entity certified by the Commission to operate the open video system should provide the Commission with the identity and mailing address of each person to receive any notices required by Commission rules. That entity should provide this information to the Commission prior to the time that it commences operation of the open video system and whenever there is a change in the identity of the person responsible for ensuring compliance with such notices. Furthermore, the Commission should provide

public notice of such filings and make the filings available for public inspection, as is currently done with traditional cable systems.

10. Second, Baseball recognizes that open video systems may serve multiple communities, only some of which are within the applicable 35-mile zone of the Sports Rule. The same is true of certain cable systems. As is the case with cable systems, Sports Rule protection should be afforded in all communities that are served by an open video system and that are located "in whole or in part" within the relevant 35-mile specified zone. 47 C.F.R. §76.67(a).

11. Finally, the 1996 Act provides that, "to the extent possible," the retransmission consent obligations that are imposed in the open video system context should be "no greater or lesser" than those that are imposed in the cable system context. 1996 Act § 653(c)(2)(A), 47 U.S.C. § 573(c)(2)(A). In its Report and Order in MM Doc. No. 92-259, 8 F.C.C. Rcd 2965, ¶ 174 (Mar. 29, 1993), the Commission clarified that programmers can negotiate limitations on the ability of broadcasters to grant retransmission consent to cable operators. The same clarification should apply in the open video system context.

Respectfully submitted,

OFFICE OF THE COMMISSIONER OF  
BASEBALL

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